IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

FILED

March 5, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DIANE GILES,	)	
	)	HAMILTON CIRCUIT
Plaintiff/Appellant	)	
	)	NO. 03A01-9510-CV-OO348
v.	)	
	)	
MICHAEL HAYES,	)	
	)	
Defendant/Appellee	)	REVERSED

Conrad Finnell, Cleveland, Attorney for Appellant.

Nora A. McCarthy, Chattanooga, Attorney for Appellee.

O P I N I O N

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_____INMAN, Senior Judge

This is a suit for damages against an agent of Allstate Insurance Company, accusing him of fraud[1] in filling out her application for a homeowners' policy of insurance. The motion of Allstate for summary judgment was granted upon the theory of *res judicata*. This appeal resulted.

BACKGROUND

Allstate issued a homeowners' policy to the plaintiff on December 30, 1988. On September 10, 1991 her house was burglarized. She filed a claim for the burglary loss which Allstate denied, alleging that the policy was void *ab initio* because plaintiff made material misrepresentations in her application for the policy in violation of TENN. CODE ANN. § 56-7-103, and in violation of the concealment or fraud provisions of the policy.

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[1]The plaintiff alleged fraud, breach of contract, and violation of the Tennessee Consumer Protection Act, TENN. CODE ANN. § 47-18-104, et seq, but briefed only the issues of fraud and the obligation of the defendant to deal fairly with her.

She filed suit against Allstate to recover under the policy. As found by this Court, the principal issue at the trial of the case centered around the fact that six months prior to applying for the Allstate policy the plaintiff suffered a loss by fire on the same house insured by Allstate. Her then insurance carrier paid her in excess of $100,000.00 as a result of that fire, and notified her that it would not renew the policy.

The plaintiff had her house repaired following which she shopped around for coverage, finally obtaining the Allstate policy. After the loss occurred and the claim was submitted, Allstate discovered that the plaintiff had not revealed the prior loss and refusal of another carrier to renew. This Court agreed with the trial judge that the policy was void, stating:

> "Upon the trial of the case, there was a sharp dispute in the testimony of Ms. Giles and Mr. Michael Hayes, the Allstate agent who took the application for insurance, as to what Ms. Giles told him or failed to tell him about the fire and refusal of Ms. Giles' insurance company to renew her policy.
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> Ms. Giles testified that after the fire and while her house was being rebuilt, her insurance company notified her it would not renew the policy when it expired in December. After receiving this notice, she contacted a number of insurance agents about writing coverage for her. She testified that when she called Mr. Hayes she told him in their initial conversation about her fire loss and her insurance carrier's notifying her it would not renew her policy when it expired. She also testified Mr. Hayes came to her house and took her application. He asked her the pertinent questions on the application and she gave correct answers. After answering the questions, she signed the application without reading it. Although she was given a carbon copy of the application at the time it was signed, she did not know the application contained incorrect answers until after her loss had occurred.
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> Mr. Hayes testified Ms. Giles did not tell him in their initial telephone conversation about her fire loss or that her insurance carrier had refused to renew her policy. He testified he filled out the application based on the information she gave him and, had she disclosed the correct information, the policy would not have been issued.
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> The court resolved this issue in favor of Ms. Giles but held it was not controlling in the case. The court found the case of *Hardin v. Combined Insurance Company of America,* 528 S.W.2d 31 (Tenn. App. 1975) to be controlling. In his determination of the case, the court said: "*Hardin against Combined Insurance Company of America* found at 528 S.W.2d at page 31, which is a case almost on all fours of what we have here. The only difference is that it involved a policy application for life insurance and this involved a policy application for homeowners coverage." "Ms. Giles signed an application that contained misrepresentations. And there is no question from the experience of this Court, more importantly from Mr. Brantley [underwriter for Allstate] that it was a material misrepresentation. There would have been no policy issued had the correct information been given."

> The trial court found the issues in favor of the Defendant. The plaintiff has appealed, saying the court was in error. We cannot agree, and affirm for the reasons herein stated.
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> After the application had been filled out by the agent, it was given to Ms. Giles. She testified she signed it but did not read it before signing it."

Ms. Giles sought to avoid the application of TENN. CODE ANN. § 56-7-103. She insisted that she correctly answered questions about her previous fire losses and the refusal of her insurance carrier to renew her policy, "but the agent [Hayes] listed incorrect answers on the application." This insistence was rejected; we held that if an insured failed to read the contract or learn of its contents she signs at her peril and will be presumed to know its contents. *See Giles v. Allstate Insurance Co.,* 871 S.W.2d 154 (Tenn. App. 1993).

THE PRESENT ACTION

Ms. Giles shifted her focus to agent Hayes during the pendency of the appeal by filing this action against him. She had sought to avoid the statutory defense by claiming that although she answered Hayes' questions truthfully, he manuscripted them otherwise without her knowledge. She did not read the application, according to her testimony, and although she was given a copy of it at the time it was signed, she said that she did not know of the incorrect answers until after the burglary loss occurred.

Asserting the binding force of the judgment in the case against Allstate, the defendant Hayes, as material here, moved for summary judgment on the basis of *res judicata.* The trial judge ruled

> " . . .The Court finds the issues of whether or not the applicable statutes of limitation bar the claims for fraud and breach of contract are moot, as this Court finds all claims characterized as fraud or breach of contract are barred by the doctrine of *res judicata.* The issues before this Court have been thoroughly litigated previously in trial courts and before the Court of Appeals. Those Courts have found the plaintiff is bound by the content of the application for insurance she signed even though she did not read it . . ."

D I S P O S I T I O N

We must respectfully disagree with the conclusion of the trial court, because the issue of whether the agent committed an actionable fraud on the plaintiff has

not been litigated in an action wherein the agent was a party and subject to having liability fastened upon him.[2] "If the doctrine of *res judicata* is to apply the prior suit it must be between the same parties, in the same capacities, and touching the same subject matter." *Grange Mutual Insurance Co. v. Walker,* 652 S.W.2d 908 (Tenn. App. 1983). This is familiar, settled law; appellee counters by arguing that issue preclusion, a generic term including *res judicata,* requires an identity or mutuality of claims creating the right of action and identity of evidence necessary to sustain each action, which are present in the case at bar. We no not agree; apart from the lack of identity of parties, the issue against Allstate was whether the plaintiff had submitted an application for insurance containing false data. There is no doubt that she did; she admits the fact, but claimed, in both trials, that although she answered the agent's inquiries truthfully, he recorded them falsely. This action exonerated the master, but does it exonerate the agent? We hold that the exoneration of the master from liability does not, *ipso facto,* immunize the agent. The liability of the agent was not decided, could not have been decided, because he was not a party to the Allstate case. Both the trial court and this Court consequently confined themselves to the issue of the liability of the insurance company. *See Dubuque Fire & Marine Ins. Co. v. Wilson*, 213 Fed 2d 115 (4th Cir., 1954). The issue at bar is whether the agent perpetrated a fraud on the plaintiff by willfully misrepresenting her responses or knowingly leaving the inquiries unanswered to her detriment. We are not prepared to hold that in the circumstances of this case the plaintiff waived the agent's alleged fraud by failing to read the application. As to this issue, the plaintiff is entitled to a trial.

The trial court's judgment is reversed and the case is remanded for trial, with costs to the appellee.

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William H. Inman, Senior Judge

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[2]In the action against Allstate, the trial judge took the agent to task for recording false data and leaving questions unanswered. But the agent was not a party to that litigation.

CONCUR:

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Herschel P. Franks, Judge

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Charles D. Susano, Jr., Judge

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	)	NO. 03A01-9510-CV-OO348
v.	)	
	)	
MICHAEL HAYES,	)	
	)	
Defendant/Appellee	)	REVERSED and REMANDED

J U D G M E N T

_____This appeal came on to be heard upon the record from the Circuit Court of Hamilton County and briefs filed on behalf of the respective parties. Upon consideration thereof, this court is of the opinion that there is reversible error in the trial court's judgment.

It is therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court is reversed and the case is remanded to the trial court for a new trial. Costs are assessed to the appellee.

PER CURIAM